IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 25, 2006

GRENDA RAY HARMER v. TENNESSEE DEPARTMENT OF CORRECTION, ET AL.

Appeal from the Chancery Court for Morgan County
No. 05-70 Frank V. Williams, III, Chancellor

No. E2006-00333-COA-R3-CV - FILED JULY 6, 2006

This appeal involves a petition for writ of certiorari filed by Grenda Ray Harmer, an inmate in the Tennessee Department of Correction ("TDOC") prison system. Mr. Harmer was found guilty of stealing several bags of pretzels by the prison disciplinary board, placed in punitive segregation for five days, and ordered to pay a $4.00 fine. Mr. Harmer filed his petition in Morgan County Chancery Court, alleging that the disciplinary board violated his due process rights by acting in an arbitrary, illegal and fraudulent manner, and committing several violations of its own disciplinary procedures. The trial court, after granting the petition and reviewing the certified copy of the disciplinary record, found that Mr. Harmer failed to prove that the board acted illegally, arbitrarily or fraudulently, and dismissed the case. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Grenda Ray Harmer, *pro se* Appellant.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Bradley W. Flippin, Assistant Attorney General, Nashville, Tennessee, for the Appellees, Tennessee Department of Correction, Commissioner Quenton White, Warden Jack Morgan, Captain Douglas Cook, and Charles Davidson.

OPINION

I. Background

At all times relevant to this appeal, Mr. Harmer was an inmate at the Brushy Mountain Correctional Complex in Petros, Tennessee. On or about December 10, 2004, several bags of pretzels that had been missing at the prison were found in the bottom of a garbage can. The reporting official, Captain Douglas Cook, conducted an investigation that included interviews with several inmates and at least one confidential informant. Based on the investigation, Capt. Cook determined that Mr. Harmer had stolen the pretzels from the kitchen area and placed them in the trash can. Mr. Harmer was charged with the disciplinary offense of larceny and, following a hearing on December 17, 2004, was convicted by the South Central Correctional Facility Disciplinary Board ("board"). Mr. Harmer was placed in punitive segregation for five days and fined $4.00. The board also recommended a "job drop and reclass," neither of which is defined in the record.

Mr. Harmer appealed the board's determination to Warden Jack Morgan, and to TDOC Commissioner Quenton White, both of whom affirmed the board's findings. Mr. Harmer then filed a *pro se* petition for common law writ of certiorari in the Chancery Court for Morgan County. He challenged the board's actions as illegal, arbitrary, fraudulent, and in violation of TDOC policies. Mr. Harmer alleged that no evidence had been introduced to support a charge of larceny, that he was denied the opportunity to review evidence, that he was denied sufficient information to defend himself, that he could not have committed the offense, that information in the disciplinary record had been falsified, and that there were numerous due process violations.

The trial court issued the writ and, following review, dismissed the petition. The trial court found that, as evidenced by the disciplinary record, the board followed the uniform disciplinary policies of the TDOC; that the board properly summarized the evidence relied upon at the disciplinary hearing; that the sanctions imposed upon Mr. Harmer did not work a significant and atypical hardship upon him in relation to the ordinary incidents of prison life, and therefore his due process rights were not implicated by the disciplinary conviction and resulting sanctions; that the board properly relied on confidential information in Mr. Harmer's conviction; that the disciplinary board did not exceed its jurisdiction or act illegally, fraudulently, or arbitrarily in its proceedings; and that Mr. Harmer was not entitled to relief.

II. Issue Presented

Mr. Harmer appeals, raising the issue, as restated, of whether the trial court erred in its dismissal of his action following its review of the disciplinary record pursuant to the issuance of common law writ of certiorari.

III. Standard of Review

The standard of review of a trial court's decision regarding a petition for common law writ of certiorari is as recently restated by this court in *Jackson v. Tennessee Dep't of Correction,* No.

W2005-02240-COA-R3-CV, 2006 WL 1547859 (Tenn. Ct. App. W.S., June 8, 2006) as follows:

> The common-law writ of certiorari serves as the proper procedural vehicle through which prisoners may seek review of decisions by prison disciplinary boards, parole eligibility review boards, and other similar administrative tribunals. *See Rhoden v. State Dep't of Corr.*, 984 S.W.2d 955, 956 (Tenn.Ct.App.1998) (citing *Bishop v. Conley*, 894 S.W.2d 294 (Tenn.Crim.App.1994)). By granting the writ, the reviewing court orders the lower tribunal to file its record so that the court can determine whether the petitioner is entitled to relief. Review under a writ of certiorari is limited to whether the inferior board or tribunal exceeded its jurisdiction or acted illegally, arbitrarily, or fraudulently. *McCallen v. City of Memphis*, 786 S.W.2d 633, 640 (Tenn.1990). The reviewing court does not weigh the evidence, but must uphold the board's decision if the board acted within its jurisdiction, did not act illegally or arbitrarily or fraudulently, and if there is any material evidence to support the board's findings. *Watts v. Civil Serv. Bd. of Columbia*, 606 S.W.2d 274, 276-77 (Tenn.1980); *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn.1983). These determinations are issues of law. *Watts*, 606 S.W.2d at 277. Since a writ of certiorari is not available as a matter of right, its grant or denial is within the sound discretion of the trial court. Such decisions will not be reversed on appeal unless there is abuse of that discretion. *Hall v. McLesky*, 83 S.W.3d 752, 757 (Tenn.Ct.App.2001) (citing *Boyce v. Williams*, 389 S.W.2d 272, 277 (1965)).

Jackson, 2006 WL 1547859 at *3. The scope of review under a common law writ of certiorari is extremely limited. "Courts may not (1) inquire into the intrinsic correctness of the lower tribunal's decision, (2) reweigh the evidence, or (3) substitute their judgment for that of the lower tribunal." *Robinson v. Clement*, 65 S.W.3d 632, 635 (Tenn. Ct. App. 2001)(internal citations omitted).

IV. Analysis

Mr. Harmer alleges numerous violations of TDOC policy in support of his assertion that the board acted illegally, arbitrarily or fraudulently in convicting him of larceny. While the TDOC Uniform Disciplinary Procedures are "not intended to create any additional due process guarantees for inmates beyond those which are constitutionally required, deviations from the policy will warrant dismissal of the disciplinary offense if the prisoner demonstrates 'some prejudice as a result and the error would have effected the disposition of the case.'" *Willis v. Tennessee Dep't of Correction*, 113 S.W.3d 706, 713 (Tenn. 2003)(quoting TDOC Policy No. 502.01(V)). We will address each of Mr. Harmer's arguments individually.

(A) *Adequate Notice*: Mr. Harmer alleges that he was provided inadequate notice of the charge against him. TDOC Policy 502.01(VI)(A)(3)(c) and (D)(3)(b) provide that an inmate is entitled to written notice of the charges against him or her at least 24 hours before the disciplinary board hearing. *See Willis*, 113 S.W.3d at 713. The record reveals that Mr. Harmer was provided a written copy of the "pending investigation" form, which he signed, on December 10, 2004, stating that he "is being placed on 7-day investigation for possible larceny from the main dinning [sic] room." Mr. Harmer also was provided a copy of the disciplinary form charging him with larceny on December 15, 2004, stating: "as a result of an investigation it has been determined through several confidential informats [sic] that inmate Grenda Harmer 88710 did take several large bags of pretzels from the main dinning [sic] room and place them in a trash bag on A-block 3 walk. Therefore he is being charged with larceny." The disciplinary hearing took place on December 17, 2004, and thus the notice requirement was met in this case.

(B) *Preponderance of Evidence*: Mr. Harmer argues that "defendant Douglas Cook acted arbitrarily and illegally in violation of [TDOC] Policy #502.01(VI)(E)(3)(c)(1) when he failed to prove Petitioner's guilt by a preponderance of the evidence." However, this argument is clearly an attempt to persuade us to reweigh the evidence presented at the hearing, which we may not do. *Willis*, 113 S.W.3d at 712; *Robinson*, 65 S.W.3d at 635. Accordingly, this argument is without merit.

(C) *Presentation of Evidence:* Mr. Harmer alleges that Capt. Cook "acted arbitrarily and illegally in violation of [TDOC] Policy #502.01(VI)(E)(3)(c)(3) when he failed to introduce: (i) evidence for Petitioner to review; (ii) witnesses for Petitioner to cross-examine." Mr. Harmer's brief states that in his case "no evidence of any type was introduced at the hearing." To the contrary, the evidence presented at the hearing consisted of Capt. Cook's testimony describing his investigation regarding the missing bags of pretzels, which led to his conclusion that Mr. Harmer had stolen them. Mr. Harmer and his inmate advisor were given the opportunity to cross-examine Capt. Cook but elected not to. Capt. Cook relied upon at least one confidential informant who stated that he saw Mr. Harmer place the bags of pretzels in the trash can. Mr. Harmer's brief states that "TDOC Policy #502.01(VI)(E)(3)(c)(3) requires '[t]he inmate or advisor will be allowed to cross-examine any witness (except a confidential source) who testified against him/her and to review all adverse documentary evidence (except confidential information).'" The record, including the transcript of the hearing, reveals that this policy was not violated at Mr. Harmer's hearing. This issue is without merit.

(D) *Verification of Confidential Information:* TDOC Policy 502.01(VI)(E)(3)(e) requires that the board chairperson independently assess and verify the reliability of the confidential information presented at the hearing. Although Mr. Harmer alleges that this was not done in his case, the disciplinary record contains the requisite Form CR-3510 "contemporaneous record of confidential informant reliability," signed by the board chairman. This form states that the "informant saw Inmate Harmer put stolen items in trash can," and that "[t]he reliability of the informant was verified in the following manner:...First-hand knowledge of the source(s) of the information and knowledge

of their reliability based on the informant(s) past record of reliability." The board chairman, Sgt. Charles Davidson, also stated at the hearing that "I did talk to the person and it was a reliable source." This issue is without merit.

(E) *Prejudice and Falsification:* Mr. Harmer alleges that Sgt. Davidson "was prejudiced against him" and that he "falsified the disciplinary hearing summary report and the confidential informant reliability form." He has provided no evidence supporting his allegation that the forms were falsified, and his bare assertion of prejudice appears to stem only from the fact that Sgt. Davidson found him guilty of larceny. We find no merit to these contentions.

(F) *Due Process:* Mr. Harmer argues that the alleged failings and violations of TDOC policy operated to deprive him of his constitutional rights to due process. As we have already noted, however, he has failed to provide evidence demonstrating that the disciplinary procedure afforded him violated TDOC policy, or that it was in some other way deficient. Moreover, pursuant to the Tennessee Supreme Court's analysis in *Willis v. Tennessee Dep't of Correction*, 113 S.W.3d 706 (Tenn. 2003), wherein a prison inmate raised substantially the same due process issues, we agree with the trial court that the sanctions imposed in this case do not rise to a level implicating Mr. Harmer's constitutional due process rights. The *Willis* Court stated:

> [A] claim of denial of due process must be analyzed with a two-part inquiry: (1) whether the interest involved can be defined as "life," "liberty" or "property" within the meaning of the Due Process Clause; and if so (2) what process is due in the circumstances. *See Bd. of Regents v. Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Rowe v. Bd. of Educ.*, 938 S.W.2d 351, 354 (Tenn.1996). Deprivation of an interest which is neither liberty nor property does not trigger the procedural safeguards of the Due Process Clause. *See Sandin*, 515 U.S. at 483-84, 115 S.Ct. 2293; *Rowe*, 938 S.W.2d at 354.
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> The United States Supreme Court has addressed, on several occasions, the issue of when a prisoner is deemed to have been deprived of a liberty interest. In *Sandin*, the Court held that a liberty interest is not created unless the disciplinary restraints being imposed on a prisoner are atypical in comparison to the "ordinary incidents of prison life." *Sandin*, 515 U.S. at 483-84, 115 S.Ct. 2293. In that case, the Court held that thirty days of punitive segregation was not a dramatic departure from the basic conditions of the prisoner's indeterminate sentence, and therefore, the prisoner was not entitled to due process protection. *Sandin*, 515 U.S. at 486, 115 S.Ct. 2293.
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> Thus, pursuant to *Sandin*, we find that Tharpe was not deprived of a liberty interest when he was punished with punitive and administrative segregation.

Willis, 113 S.W.3d at 711. Similarly, we hold that Mr. Harmer was not deprived of a liberty interest when he was punished with five days of punitive segregation. Regarding Mr. Harmer's four-dollar fine, the *Willis* Court held that "the de minimus nature of the [five-dollar] fine makes it immune from procedural due process requirements." *Id.* at 712.

V. Conclusion

For the aforementioned reasons, we affirm the judgment of the trial court. Costs on appeal are assessed to the Appellant, Grenda Ray Harmer.

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SHARON G. LEE, JUDGE